

STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)	Docket No. 01-AFC-4
)	
Application for Certification for)	
the East Altamont Energy Center)	
_____)	

**COMMENTS OF COMMISSION
STAFF IN RESPONSE TO COMMENTS
SUBMITTED BY THE MOUNTAIN HOUSE COMMUNITY
SERVICES DISTRICT ON THE REVISED PRESIDING MEMBER'S
PROPOSED DECISION FOR THE EAST ALTAMONT ENERGY CENTER**

I. INTRODUCTION

On June 5, 2003, the Mountain House Community Services District (MHCS D) submitted comments on the Revised Presiding Member's Proposed Decision (RPMPD) for the East Altamont Energy Center (EAEC) Application for Certification. California Energy Commission (Energy Commission) staff respectfully submits the following comments in support of those from MHCS D.

**II. THE ISSUE OF WHO WOULD HAVE THE LEGAL AUTHORITY TO SERVE
EAEC WITH RECYCLED WATER NEED NOT AND SHOULD NOT BE
RESOLVED IN THESE PROCEEDINGS**

As noted by staff in previous briefs on the matter, and confirmed by MHCS D at the RPMPD Conference, MHCS D may be able to serve EAEC directly with recycled water. (Energy Commission Staff's Opening Brief on Water Resources, Fire Protection, Biological Resources, Alternatives, and Hazardous Materials, pp. 15-16.) MHCS D will be the only producer of recycled water in the vicinity of the proposed EAEC and has full legal authority to determine where the recycled water would be used. (Exh. 1, p. 5.14-20; RT 10/16/02 pp. 356-366.) The Byron-Bethany Irrigation District (BBID) conceded at the RPMPD conference that it would have to get permission from MHCS D if it wanted to sell recycled water to EAEC. Therefore, MHCS D would have to be involved in any decision to provide EAEC with recycled water.

The same may not be the case with BBID. While acknowledging that MHCSO has legal control of the recycled water, BBID claims that the Public Utility Service Duplication Act, Public Utilities Code section 1501 et seq., prevents MHCSO from serving EAEC with recycled water directly. A close reading of the referenced statute, however, shows no such prohibition.¹ At the very most, the Service Duplication Act would require MHCSO to compensate BBID to the extent that any of BBID's property is rendered inoperative, reduced in value, or useless. (Pub. Util. Code, §1503) Since BBID is not currently serving any customers with recycled water, and there is no infrastructure in place to do so, it is unlikely that there would be any loss to compensate. Nevertheless, resolving the legal issue of which agency has the legal authority to serve recycled water is outside of the Energy Commission's jurisdiction; the matter is between BBID and MHCSO and should be resolved outside of the Energy Commission's proceedings. (Pub. Util. Code, §1504 ("just compensation...shall be as may be mutually agreed by [the parties]...or as ascertained and fixed by a court of competent jurisdiction.")) The important point here for the Commission's decision on EAEC is that the evidence in the record supports a finding that recycled water will be available and both agencies that claim to have the authority to serve recycled water have expressed an interest in providing such water to EAEC.

III. THE COMMISSION'S CONDITION REQUIRING RECYCLED WATER USE SHOULD REMAIN NEUTRAL AS TO WHO WOULD PROVIDE THE RECYCLED WATER BECAUSE SUCH SPECIFICITY IS UNNECESSARY AND THE ISSUE OF WHO COULD PROVIDE THE RECYCLED WATER IS UNRESOLVED.

Condition of Certification Soil & Water 5 should be neutral as to what agency will be supplying the recycled water because, among other things², there remains a dispute over which agency has the legal authority to serve recycled water to EAEC. The condition should be worded in such a way as to allow either agency to supply EAEC with recycled water, depending on which agency has the legal authority and ability to do so. By requiring EAEC to obtain recycled water from BBID alone, the current condition prevents MHCSO from directly providing recycled water to EAEC, even though it may have the legal authority and ability to do so. Additionally, such specificity is unnecessary. A condition directing EAEC to obtain recycled water, without specifying

¹ The act specifically refers to compensation for damages; nowhere is it stated that the action in question is prohibited. (Pub. Util. Code, §1501 ("The Legislature further finds and declares that it is necessary for the public health, safety, and welfare that privately owned public utilities regulated by the state be compensated for damages that they may suffer by reason of political subdivisions extending their facilities into the service areas of such privately owned public utilities.").) If the legislature had intended to forbid such activity, it would have expressly stated such intent and would not have focused on compensation.

² Staff is not abandoning the position, iterated in our comments on the RPMPD, that delegating implementation of a condition of certification to a non-regulatory agency is inappropriate, especially in this instance where Resolution 75-58 must be implemented by the Commission. (Comments of Commission Staff on the Revised Presiding Member's Proposed Decision for the East Altamont Energy Facility, pp. 4-8.) For the purpose of brevity, however, we do not reiterate that argument here.

the provider, guarantees the Energy Commission would avoid unnecessarily limiting EAEC's options for obtaining recycled water and yet still ensures that recycled water is used by EAEC to the extent that it is available. Staff recommends that the condition be revised to allow either agency to provide the recycled water to EAEC and provides a recommendation for such wording below.

IV. IN ORDER TO AVOID PRECLUDING MHCSO FROM PROVIDING RECYCLED WATER, STAFF RECOMMENDS THE FOLLOWING CHANGES TO THE FINDINGS AND CONDITION OF CERTIFICATION SOIL&WATER 5

A. Findings

15. Applicant will design and construct the EAEC to utilize recycled water when it becomes available from BBID.
16. Applicant has identified specific routes for a recycled water pipeline extending from MHCSO's treatment facility to the EAEC and acknowledged that BBID could make recycled water could be made available to EAEC by the year 2005.
17. Recycled water could be available to the EAEC from the MHCSO and BBID before the proposed facility is operational.
25. ~~The quantity of recycled water available to EAEC will be determined by BBID under their balanced use approach. Irrigation and agricultural use may consume greater quantities in summer months.~~

B. Condition of Certification Soil & Water 5

Prior to plant operation an ~~18-inch pipeline and pump facility~~ capable of conveying recycled water from MHCSO's treatment facilities to EAEC shall be built. Prior to the start of project operation, the project owner shall submit a formal request to a recycled water producer or supplier pursuant to Water Code section 13580.7 for recycled water to satisfy the cooling water needs of the project. Applicant ~~Prior to using fresh inland water, the project owner shall accept use all the recycled water available for conveyance to the project offered to it by BBID at a cost comparable to or lower than the cost of potable water.~~

Verification: No later than sixty (60) days prior to the start of plant operation, the project owner shall submit to the CPM evidence that the pipeline has been built and is capable of conveying no less than 5,900 gpm to EAEC. No later than 220 days prior to start of plant operation, the project owner shall submit to the CPM evidence that a formal request for recycled water pursuant to Water Code section 13580.7 has been made. No later than 60 days prior to the start of plant operation, the project

owner shall submit to the CPM the contract detailing the rate and conditions for recycled water service established pursuant to Water Code section 13580.7, and

~~Prior to commencing operations owner shall submit~~ a signed copy of a water supply agreement with BBID setting forth the rates and conditions for the any fresh and recycled water supply.

DATED: June 9, 2003

Respectfully submitted,

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